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*Court of Chancery of Delaware.*

## THE JACKSON & SHARP CO. *v.* THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD CO.

Although a revocable license such as the grant of a privilege accessary to a permanent business, may by the expenditure of money by the licensee become a contract which will be enforced by a court of equity, yet this principle must always depend for its application to any particular case upon the presumed intent of the parties that the privilege should be commensurate with the business as a *right* in all events, and not merely as a voluntary accommodation.

It is settled that at law a license cannot create or transfer any interest in land. Hence, a mere license affecting lands is at law always revocable though granted for a valuable consideration, and though the licensee may have expended money on the faith of it.

This rule is modified in equity by the principle of equitable estoppel, but equitable estoppel proceeds always on the basis of preventing fraud. Its effect is to restrain the exercise of a legal right, and this even a court of equity cannot do unless there has been such conduct as would render the assertion of the legal right a fraud.

The erection of a side track connecting with a railroad, at the expense of plaintiff, and the subsequent expenditure of large sums of money by him in the erection of car-works, from which cars were delivered by means of the side track, *held* not to estop the railroad company from revoking their license to connect the side track with the company's track.

THIS was a bill in equity to restrain the defendants from taking up a side-track which connected their railway with the works of the complainants for the manufacture of railroad cars in the city of Wilmington.

The case arose out of these circumstances:—Messrs. Jackson & Sharp, the predecessors in business of the Jackson & Sharp Company, erected the car works about the year 1863, adjacent to the railroad track in Wilmington, on the easterly side, a short distance above the crossing at Seventh street. About the time of the erection of the car works or soon after, but precisely when was not proved, one of the firm, Mr. Jackson, applied to the officers of the railroad company to connect the car works with the railroad by means of a side-track for greater convenience in the delivery of freight and manufactured cars. This application was acceded to, and after some two or three months' delay the promised connection was effected, deliveries between the railroad and car works being meanwhile made by temporary expedients. Prior to Jackson & Sharp's application, a side-track had been

laid on the same side of the railroad below Seventh street, upon the application of other parties, for the purpose of connecting the road with their works located below that street. To effect the connection with Jackson & Sharp this side-track was extended by the railroad company above Seventh street northwardly as far as the car works, and was there connected with the works by curved tracks extending from the side-track into one of the shops. Afterward, in the year 1868, upon the erection by Jackson & Sharp of a paint shop, a similar connection was formed with that shop. These arrangements were completed by the employees of the railroad company, under the immediate direction of its officers, and the expense was apportioned between the parties according to the extent of track laid upon their respective lands. The side-track and curves continued to be used by Jackson & Sharp and their successors in business, the Jackson & Sharp Company, without interruption or complaint, until the year 1870, when a controversy arose between the parties, and the railroad company gave notice of their purpose to take up the side-track; whereupon the present bill was filed and a temporary injunction obtained.

*T. F. Bayard* and *S. M. Harrington*, for the complainants.

*N. B. Smithers* and *G. C. Gordon*, for the defendants.

BATES, C.—The claim made on the part of the complainants to the perpetual use of the side-track in controversy as a legal right is based upon two grounds. One of these is, that the right was acquired by contract between their predecessors Jackson & Sharp, and the railroad company; the other, that even were there in the first instance no contract, but only a permissive use of the track under a license, still that the license having been acted upon in the expenditure of large sums of money on the faith of its indefinite continuance, has become irrevocable under the doctrine of equitable estoppel.

1. First, is the question of contract. Here it may be well to notice that the point to be inquired of is, not whether upon the application of Jackson & Sharp to the officers of the railroad company a side-track was promised and afterward laid, but whether the transaction included a stipulation by the company, express or implied, for the perpetual use of the side-track by

Jackson & Sharp and their assigns, as a right appurtenant to the car works. Now, in the view which I take of the facts, it becomes immaterial that the right claimed is an interest in real estate, such that under the Statute of Frauds a contract for it is required to be in writing; for it seems quite certain upon the proofs that there was no contract, either written or verbal, conceding to Jackson & Sharp and their assigns, the perpetual use of this side-track as a right, or in any degree restricting the power of the railroad company, as owners of the soil, to take it up at their pleasure. The case, upon the question of express contract, rests on the testimony of Mr. Jackson, of the firm of Jackson & Sharp, and Mr. Felton, the then president of the railroad company, who represented the parties in the original transactions, and between whom the contract, if there were any, must have been effectuated. Both these gentlemen testify with evident candor and caution, and without any material discrepancy in their statements. The result of their testimony is, that at some time early in the commencement of the car-work enterprise, after the selection of the site for the works, but whether before or after their erection does not appear, Mr. Jackson, on behalf of his firm, applied to the officers of the railroad company for a connection between the car works and the railroad. The application was acceded to, and after some delay the connection was made, deliveries of freight and manufactured cars being meanwhile effected by temporary expedients. Not a word, however, appears to have passed, intended to define the respective rights of the parties in the side-track after it should be laid, or to prescribe any term or condition of its continuance, whether, on the one hand, it should remain for the permanent accommodation of the car works as an easement appurtenant to them, and beyond the power of the Railroad Company to terminate it, or whether, on the other hand, its continuance was to depend upon the mutual interest and good-will of the parties. Mr. Jackson does not state that there was any stipulation for the permanence of the side-track—not even that he understood such to be the purport of the promise to lay the track made in response to his application for it. Mr. Felton, the president of the railroad company, under whose direction the connection was made, negatives any such stipulation by stating in substance, that he directed the connec-

tion in the usual course of the granting of such accommodations, and subject to the general understanding in such cases, that the tracks forming the entire connection should remain under the control of the respective owners of the land on which different portions of it might be laid, without prejudice (as he must be understood to mean) to any rights of property on either side. It may then be safely concluded that there was no express contract.

But it was argued that a contract may be implied from the acts of the parties. And the principle sought to be applied at this point of the argument was one announced by GIBSON, C. J., in the Pennsylvania cases of *Rerick* v. *Kern*, 14 S. & R. 267, and *Swartz* v. *Swartz*, 4 Barr 353, that the grant of a privilege which is accessary to a permanent business is presumed to be commensurate in duration with the business, and although at first but a license, and as such revocable, yet that when acted upon in the expenditure of money it becomes a contract for a valuable consideration, to be executed by a court of equity as a contract part performed. It will be observed, that this principle must depend, for its application to any particular case, upon the presumed intent of the parties that the privilege granted in such case should be commensurate with the business to which it might be accessary *as a right in all events*, and not as an arrangement depending upon the will of the parties for its continuance. Ordinarily, such a presumption may be a reasonable one. In the Pennsylvania cases it was clearly so. But after all, this presumption, or, to speak more accurately, this inference as to the intent of the parties, is one controlled by the circumstances of the particular case, and may be wholly countervailed by evidence demonstrative that the privilege in question was in fact granted and accepted not as a perpetual, indefeasible right, but as a voluntary accommodation, to abide the good-will and mutual interests of the parties. Such in the present case is the construction which the evidence obliges me to give to the acts of the parties. As this view is the one decisive of the case, some explanation of the reasons for it is due to counsel.

In the first place, then, I lay out of consideration, as a ground for inferring the concession of a perpetual right to the use of this side-track, the great value of such a right to the ownership of the car works. For opposed to this, as a ground for such an inference, is a consideration of hardly less force, which is the

interest of the railroad company to preserve unimpaired its proprietary control over its road-bed and side-tracks. And in addition to this, is its obligation as a public corporation, to keep its road, while held for the purposes of the incorporation, unencumbered by private rights or easements of a permanent nature, such as might under any circumstances embarrass its use as a public highway of travel,—an obligation held in the late Pennsylvania cases, to be of so much force as to qualify the doctrine of *Rerick* v. *Kern*, that a license is presumed to be commensurate with the business to which it is accessary, leaving that doctrine not applicable to licenses by railroad companies affecting lands held by them to corporate uses: *Heyl* v. *The Philadelphia, Wilmington, & Baltimore Railroad Company*, 51 Penna. St. 469: *Wunderlich* v. *The Cumberland Valley Railroad Company*, a late case in the Supreme Court of Pennsylvania, not yet reported. The principle of these cases does not go so far as to preclude a railroad corporation from granting private rights or easements in its lands, to be exercised subject to its paramount obligations to the public; but it offers a strong ground against presuming such grants in the absence of express stipulations,—such as would be proper in order definitely to limit or qualify the rights granted, as rights subordinate to the public obligations of the company.

It is clear then that the relative interests of these parties, the one in acquiring and the other in withholding a perpetual easement in the side-track, can afford no legitimate ground of inference as to whether or not the track was laid with an intent to confer such an easement. That is a question to be determined rather by the transactions between the parties than by their respective interests.

Taking up then, for this purpose, the evidence of the transactions between the parties, I am met at the outset by a fact of irresistible force, disclosed in the testimony of Mr. Felton, the then president of the railroad company, by whom the side track was directed to be laid, viz. that the track was laid according to the usual course of granting such accommodations by the company to business establishments located along its road, it being the general understanding in such cases, that the continuance of the accommodation was to be voluntary on both sides, prejudicing no right of property in the soil, but leaving to the company the absolute control over its own track, with the like control in the

owner of the connected works over the track laid upon his land. And it further appears that it was with this reserved control, tacitly understood by the parties concerned, that the connections similar to the one in question had been made between other works and this same side-track, prior to its extension northward of Seventh street to the car works of Jackson & Sharp,—on which latter point Mr. Felton is corroborated by testimony drawn from the connected works below Seventh street. Against the force of this evidence the testimony of Mr. Jackson, who acted for his firm, proves not only no stipulation with him varying the usage obtaining under other connections of this nature, but not even his own understanding or impression that the railroad company intended to concede the perpetual use of the side-track as a right, or upon any other than the usual tenure of such accommodations, viz., mutual interest and good will. And, then in addition to all this, is something quite inexplicable, upon the theory of a negotiation looking to a perpetual connection with the railroad, as a legal right appurtenant to the car works,—that is, the omission of Jackson & Sharp to seek a grant or contract in writing for securing a title so important; and the omission of the railroad company also in the concession of a right so seriously affecting their property, to impose some written conditions touching the maintenance and mode of using the side-track. On the whole, gathering the intention of these parties, as we are left to do, from their acts, without any direct expression of it, I can construe this transaction only as a parol license for the permissive use of the side-track, and not as a contract for the right, express or implied.

2. Let us then proceed to consider the case in the aspect of a license. On this branch of the case there are several material points upon which no controversy was raised in the argument. One of these is, that the right claimed for the complainants is to an easement or interest in the land of the railroad company, the claim being to the perpetual use of the side-track as a right appurtenant to the car works, transmissible with the title to them, and binding the land of the company into whosesoever hands it may come, at least so long as it shall be used for the purposes of a railroad. *Pitkin* v. *The Long Island Railroad Company*, 2 Barb. Ch. R. 221, is a case very similar. Further, it is agreed that *at law* an estate or interest in land can be created only by deed or grant under seal, or by prescription, or in this country by

twenty years' adverse possession or user; *in equity* such an interest may additionally be acquired by contract, which however must, under the Statute of Frauds, be in writing, subject to an exception of the equity arising out of part performance of a verbal contract. Again, it must be admitted that a license or permission to exercise some privilege upon the land of the licensor can create no estate or interest in the land, such as binds the land and is transmissible from the licensee, the utmost effect of a license being to confer a personal privilege, which is not assignable or transmissible, and is revocable at the licensor's pleasure. Nor, does it matter whether the license be by parol or in writing, so long as it remains a mere license, not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel, as under some circumstances, to be presently noticed, it may be, in equity though not at law. Few points have undergone more discussion, and have at lengh come to be better settled, than the insufficiency of a license at law to create or transfer an interest in land. In England the leading cases are *Fentiman* v. *Smith*, 4 East 107; *Rex* v. *Herndon on the Hill*, 4 M. & S. 565; *Hemlins* v. *Shipman*, 5 B. & C. 22, 11 E. C. L. 207; *Bryan* v. *Whistler*, 8 B. & C. 288, 15 E. C. L. 219; *Cocker* v. *Cowper*, 1 C. M. & R. 418; and *Wood* v. *Leadbitter*, 13 M. & W. 838, in which last case the prior course of decisions is very fully reviewed. In this country the same rule was adjudged, as early as 1814, by C. J. PARSONS, in *Cook* v. *Stevens*, 11 Mass. 533. He has been followed in many of the states: *Mumford* v. *Whitney*, 15 Wend. 384; *Foot* v. *The N. H. & Northampton Railroad Company*, 23 Conn. 214; *Foster* v. *Browning*, 4 R. I. 47; *Den* v. *Baldwin*, 1 Zabriskie 390; *Hays* v. *Richardson*, 1 G. & J. 38; *Carter* v. *Harlan*, 6 Md. 20; *Bridges* v. *Purcell*, 1 Dev. & Bat. 492.

But it was earnestly urged that although a license is revocable so long as it is executory and the parties remain *in statu quo*, it ceases to be so, under the doctrine of equitable estoppel, after it has been executed, the licensee having expended money or otherwise involved himself so that he cannot recede without prejudice; that in this case Jackson & Sharp having made large expenditures in erecting and afterward enlarging their car works upon the faith of their enjoying the continued use of this side-track,

the railroad company are equitably estopped from revoking the license.

Were this a case in a court of law, the answer would be that *at law* a license can under no circumstances become irrevocable by estoppel *when the effect would be to create an interest in land.* The doctrine of equitable estoppel, although largely adopted in courts of law and frequently so applied as to render licenses irrevocable, has been held not to apply to licenses, which if rendered perpetual would amount to an easement in lands. The reason is a plain and necessarily conclusive one, viz., that courts of law do not recognise mere equities, such as arise out of an equitable estoppel enforced against the legal owner of lands; but they deal only with legal estates, such as are acquired through legal forms of conveyance,—or their equivalent under the Statute of Limitations, an adverse possession of twenty years,—or at least by writing under the Statute of Frauds. Hence, a mere license affecting lands is at law always revocable, even though granted for a valuable consideration, as in *Fentiman* v. *Smith*, 4 East 107, and *Wood* v. *Leadbitter*, 3 M. & W. 833, and although the licensee may have expended money under it, which was a feature of many of the cases before cited.

It is true, however, that in this court equities in land, though not created by any deed, grant, or writing whatever, but springing out of the acts and relations of the parties, are largely enforced, and among these a large class are those which arise under the doctrine of equitable estoppel applied to prevent constructive fraud—as where one having title to land is knowingly silent in the presence of an innocent purchaser from a third person, or where one knowing his title to land silently permits another ignorantly to build on it—in these and in like cases this court, in order to prevent fraud, will raise out of the transaction an equity in favor of the party misled, binding the conscience of the owner and restraining the exercise of his legal rights against such party. No reason is perceived why, in a proper case, the same principle should not in equity restrain the revocation of a privilege affecting the use of land. But it must be carefully observed, that this principle of equitable estoppel proceeds upon the ground of *preventing fraud.* Its effect when applied is to restrain a party from exercising his legal right, and this even a court of equity cannot do unless there has been on his part some conduct, declaration,

or improper concealment, misleading an innocent person to his prejudice, and rendering the assertion of the legal right as against such person an act of bad faith, amounting to constructive fraud. Moreover, it may be well added that to warrant the interference of the court with the legal right or title of a party, the case relied on to work the estoppel must be clear beyond doubt upon the facts. And the more stringently do these rules apply in a case such as this, where the effect of the estoppel, if allowed, will be to convert what was originally a bare privilege, temporary and revocable, into an easement in the licensor's land, perpetually binding it and transmissible from the licensee.

It is a fatal infirmity in this branch of the complainant's case that there was nothing in all the communications had between the officers of the company and Jackson & Sharp, or in the conduct of these officers, to justify Jackson & Sharp in assuming that the company, by granting the accommodation applied for, intended to relinquish any right of property in the soil. It is agreed that no stipulation or promise to that effect was expressed. For reasons before fully stated and which need not be repeated, Jackson & Sharp were not warranted to infer so grave a concession by the company as the relinquishment of its proprietary control over its soil from the bare fact that on their application the side-track was laid, nor from its importance as a right appurtenant to the car works; nor did the general usage connected with the granting of this sort of accommodation by the railroad company justify the inference that a perpetual easement in this track was conceded; but the usage was to the contrary. Looking to all the circumstances of the case, it is my conviction that although the connection of the car works with the railroad was doubtless contemplated on both sides as one to be in fact permanent, yet that no stipulation to that effect was asked or given, or supposed by either party to have been given; but that the arrangement was tacitly left to rest upon the general understanding with respect to such accommodations,—Jackson & Sharp either not anticipating the contingency which has now happened, or trusting to the mutual interest and good will of the parties as a sufficient guarantee for the permanence of the connection, without securing it as a legal right according to prescribed forms of law. Their disappointment certainly involves them in no little hardship. But hardship is not a ground for equitable relief, except

in favor of one who, without any negligence in securing his rights by the appropriate legal modes, has been misled to his prejudice through some fraud or laches of the party against whom the relief is sought, or by such conduct of the latter as renders it an act of bad faith to take advantage of the mistake.

The injunction must be dissolved and the bill dismissed.

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*Superior Court of Connecticut.*

## LANDOLT v. CITY OF NORWICH.

There is a duty upon towns and cities to keep their highways in safe condition for travelling by foot passengers as well as others.

But this duty as applied to ice and snow on a sidewalk is not a duty to keep the sidewalks absolutely free from ice, and the liability of the city for injuries received by a fall on the ice, is to be determined in each case by the particular circumstances existing in that case.

THIS was an action for damages received by a fall on the ice.

*Wait & Swan* and *Holbrook*, for plaintiff.

*Halsey* and *Pratt*, for defendant.

The opinion of the court was delivered by

SEYMOUR, J.—The plaintiff claims damages for an injury suffered by him on Sunday, Jan. 8th 1871, by reason, as he says, of a defective sidewalk in the city. About four o'clock in the afternoon of that day, while walking along Union street, he slipped and fell, receiving an injury of some severity. It is clear that the ice was the cause of the accident, and the only question in the case is, whether the condition of the sidewalk was such, as under the circumstances to subject the city to damages.

The rule of law on the subject, as recently settled by the court of errors, is that some duties may devolve on cities and towns in regard to ice, and that what those duties are cannot be definitely defined by law, but must in each case depend upon all the circumstances of it, the general rule being that towns and cities must use reasonable care to make their streets safe for public travel, whether on foot or in carriages.

The facts are briefly these: The street is one of considerable